

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

U.S. COURT OF APPEALS
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FIFTH CIRCUIT

IN RE JITENDRA SHAH

Plaintiff – Relator

**On Petition For Writ Of Mandamus
To the United States District Court for the Southern District of Texas
Houston Division
Civil Action 4:12-CV-02126**

Respectfully submitted,

JO MILLER
State Bar Number 00791268
LAW OFFICE OF JO MILLER, P.L.L.C.
505 North Main
The Parsonage
Conroe, Texas 77301
Tel. (936)539-4400
Fax. (936)539-4409
jmiller@jomillerlaw.com

SCOTT NEWAR
LAW OFFICE OF SCOTT NEWAR
State Bar Number 14940900
3700 Buffalo Speedway, Suite 1100
Houston, Texas 77098
(713) 226-7950 (Telephone)
(713) 226-7181 (Fax)
newar@newarlaw.com

**ATTORNEYS FOR RELATOR,
JITENDRA SHAH**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Plaintiff-Relator

Jitendra Shah

II. Defendant-Respondent

Texas Department of Criminal Justice

III. Counsel for Plaintiff-Relator

Jo Miller
Scott Newar

IV. Counsel for Defendant-Respondent

Attorney General for the State of Texas
Greg Abbott

Assistant Attorneys General for the State of Texas
Allan Cook
Jonathan Stone

/s/ Jo Miller

Jo Miller

Attorney for Jitendra Shah, Relator

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I. INTRODUCTION

Jitendra Shah, Plaintiff-Relator, is a dark-skinned native of India and a citizen of the United States. On July 13, 2012, Mr. Shah sued his former employer, the Texas Department of Criminal Justice (“TDCJ”), in the United States District Court for the Southern District of Texas (Houston Division), alleging that TDCJ violated Title VII of the Civil Rights Act of 1964 by subjecting him to race (Asian) and national origin (Indian) discrimination and retaliation for opposing such discrimination. Mr. Shah’s case was assigned to United States District Judge Lynn N. Hughes.

During a November 26, 2012 pre-trial conference—which Judge Hughes held *ex parte* with TDCJ’s counsel—Judge Hughes made numerous statements that reflect bias or prejudice against Mr. Shah based on the latter’s race/national origin and/or status as former government employee. Consequently, on January 31, 2013, Mr. Shah filed a Motion To Recuse Judge Hughes and a Motion To Stay the litigation pending a ruling on the recusal motion. Subsequently, Mr. Shah filed a Motion To Expedite Consideration of the recusal motion.

Although Judge Hughes has not formally ruled upon Mr. Shah’s Motion To Recuse, Judge Hughes has effectively denied it and continues to preside over this litigation. Accordingly, Mr. Shah seeks a writ of mandamus from this Court

ordering Judge Hughes to recuse himself or, alternatively, to immediately rule upon the Motion To Recuse and stay further proceedings until that time.

II. JURISDICTION

This court has jurisdiction of Mr. Shah's Petition For Writ Of Mandamus pursuant to the All Writs Act, 28 U.S.C. section 1651.¹

III. FACTS

A. Jitendra Shah Sues TDJC Under Title VII For Race And National Origin Discrimination

On July 13, 2012, Jitendra Shah, Plaintiff-Relator, filed suit against his former employer, the Texas Department of Criminal Justice ("TDCJ") in the United States District Court for the Southern District of Texas, Houston Division. *See* [Appx.1] SDTX Dkt. 1. In his Complaint, Mr. Shah alleges that TDCJ violated his rights under Title VII of Civil Rights Act of 1964 ("Title VII") when it discriminated against him on the basis of his race (Asian) and national origin (Indian) with respect to pay and promotions and then retaliated against him for opposing such discrimination by terminating his employment. *Id.* On July 16,

¹28 U.S.C. section 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

2012, Mr. Shah's lawsuit was assigned to United States District Judge Lynn Hughes. *See* [Appx.1] SDTX Dkt. 2.

On August 20, 2012—before TDCJ answered—Mr. Shah filed his First Amended Complaint. *See* [Appx.1] SDTX Dkt. 4. On September 20, 2012, TDCJ filed its Answer to Mr. Shah's First Amended Complaint. *See* [Appx. 1] SDTX Dkt. 6.

On October 1, 2012, the District Court scheduled its second pre-trial conference for November 26, 2012, at 10:00 a.m. *See* [Appx.1] SDTX Dkt. 10.

B. Judge Hughes Holds *Ex Parte* Pre-Trial Conference On 11/26/12

At approximately 8:09 a.m. on November 26, 2012, Jo Miller—then Mr. Shah's sole attorney—notified the District Court via a telephone message to Judge Hughes' chambers and via e-mail to Judge Hughes' Case Manager, Glenda Hassan, that she (Miller) was sick and would not be able to attend the pre-trial conference scheduled for 10:00 a.m. *See* [Appx. 8] SDTX Dkt. 45; [Appx. 5] SDTX Dkt. 30, Exhibit 3, at 3:3-5 (hereinafter "11/26/12 Transcript") ("The Court: Ms. Miller notified us that she was not coming, saying she had the crud."). In her e-mail, Ms. Miller advised the District Court that she (Miller) could be "reached" by telephone and provided her home telephone number. In her voice-

mail message, Ms. Miller provided the Court with her cellular telephone number.

[Appx. 4] Exhibit 2 Dkt. 30-2; [Appx. 8] Dkt. 45.

Despite Ms. Miller's advance notification that she could not attend the November 26, 2012 pre-trial conference, the District Court did not reschedule the conference. Rather, the District Court held the November 26, 2012 pre-trial conference with *only* TDCJ's counsel (Allan Cook and Jonathan Stone) present. *See* [Appx. 5] 11/26/12 Transcript at 1. Moreover, the District Court made no attempt to contact Ms. Miller so that she could attend the conference by telephone. *See* [Appx. 4] SDTX Dkt. 30-2, at paras. 6-8.

C. Judge Hughes' Biased And Prejudiced Statements

Judge Hughes began the 11/26/12 pre-trial conference by noting Ms. Miller's sickness and absence. Then, Judge Hughes asked TDCJ's counsel "how did the deposition of [Mr. Shah] go."² [Appx. 5] Dkt. 30-3 at 3:6.

After TDCJ's counsel first denigrated Mr. Shah's intelligibility during his deposition, *id.*, at 3:8, TDCJ's counsel stated: "I don't know how much of that [deposition testimony] you want to hear in Ms. Miller's absence...." *Id.*, at 3:20-22. Despite TDCJ's counsel manifest concern about engaging with Judge Hughes

² Judge Hughes allowed TDCJ to depose Mr. Shah on November 9, 2012. To date, despite Mr. Shah's repeated requests, Judge Hughes has still not permitted Mr. Shah to depose any of TDCJ's witnesses.

in an *ex parte* communication about Mr. Shah's deposition testimony, Judge Hughes nevertheless proceeded to question TDCJ's counsel about that testimony.

The following colloquy then ensued:

MR. COOK:

And there was testimony that he [Shah] certainly knew that reductions-- significant financial changes were in the works, as every employee of the State of Texas knew at that time.

THE COURT:

All except deputy directors for public relations, people like that who are essential to the operations. The diversity director at Purdue makes \$435,000 a year. Why don't they just hire people on ability and let diversity take care of itself? And what does the diversity director do? *Go around and painting students different colors so that they would think they were mixed?*

MR. COOK:

Builds a record for the eventual lawsuit that will challenge the diversity on the one side and then on the other side.

THE COURT:

You can't do that.

MR. COOK:

It's an industry.

THE COURT:

If you assiduously set about to be diverse instead of get the best people, aren't you violating the law?

MR. COOK:

One could certainly argue that.

THE COURT:

Anyway, *would it be accurate to say from this chronology of his personnel file that he had bouts of being a difficult employee?*

MR. COOK:

He was never disciplined, I will say that. I don't think he was ever disciplined.

THE COURT:

No. But there's a level of obnoxiousness like the law clerks that wouldn't make me fire them.

MR. COOK:

I think based on his personnel file and certainly the testimony we heard, he was never satisfied with his salary. As an ongoing -

THE COURT:

That puts him in common with every state employee.

MR. COOK:

Well, that may very well be true.

THE COURT:

Not true --I mean it's true that they're not happy, it's not true they're underpaid.

MR. COOK:

So --and that is sort of a recurring theme throughout his complaints, even up to and including the grievance he filed after the reduction in force, February, 2011. The first shot out of the barrel is a grievance that he writes on his own behalf "Please don't RIF me and you should be paying me more money."

THE COURT:

That's the March 1 response that's three days later?

MR. COOK:

Yes, that's right, your Honor. So, our position would be that really this is all about the money. It's not at all about race, religion, national origin, or anything else. It's about the money. And in fact, he admitted that in his deposition but for --

THE COURT:

Well, what race is he to the extent those are meaningful at all?

MR. STONE:

He's --he's Asian, I think he said.

THE COURT:

That doesn't -

MR. COOK:

I thought he said he was Hindu.

MR. STONE:

No. Yeah. When we asked him what race he was, he said his race was Hindu. So-

MR. COOK:

Right. And his religion was also Hindu.

THE COURT:

All right. So, he's Caucasian?

MR. COOK:

No. He's Indian.

THE COURT:

They're Caucasian.

MR. COOK:

Okay.

THE COURT:

All right.

MR. COOK:

Okay.

THE COURT:

That's where we came from.

MR. COOK:

All right.

THE COURT:

That's why Adolph Hitler used the swastika.

MR. COOK:

Well--

THE COURT:

It was a symbol of good luck.

MR. COOK:

-Right.

THE COURT:

-in going back in Sanskrit to the Aryan people which he claimed a bunch of Germans were. They act a lot like Germans.

....

THE COURT:

How can you be the longest serving engineer and be denied economic opportunity?

MR. COOK:

Uh-huh, correct.

THE COURT:

He has the job. It doesn't mean you get the job you want or you're paid the most. *There is no tenure factor in layoffs.*³ Companies may do it if they want to.

³ In fact, TDCJ's Reduction in Force policy specifically allows for consideration of tenure in some situations.

MR. COOK:

That's correct. So, I think at bottom that's really what this is all about. And I think he looks at the failure to be promoted, compensated the way he thought he should be and he sees "I'm the only Indian here"; and he says, "It must be discrimination."

THE COURT:

You do enough of these to know that that's a common --I'm a good person so it must have been something arbitrary.

MR. COOK:

And your Honor, nobody says he's not a good person. C. F. Hazelwood will testify that he's a perfectly nice fellow. He didn't want to let him go, had to do it.

THE COURT:

The fact that he's the only Indian there is a fact in the department's favor.
It would be real easy not to hire the first Indian.

MR. COOK:

It would be hard not to hire an Indian engineer, though.

THE COURT:

No.

MR. COOK:

A lot of engineers out there are Indian. And they actually offered a job to one recently who turned it down.

THE COURT:

Oh. But that's when you're hiring on merit. But sometimes people decide--
Eleanor Roosevelt said staffs of one color always work better. They don't put that on the postage stamp. But when you hire somebody who applies and there's nobody else like them, isn't that what you're supposed to do?

MR. COOK:

Sure.

THE COURT:

And then you kept him a long time.

MR. COOK:

Kept him a long time.

THE COURT:

All right. Well, I think it's time for you to move for summary judgment.

See [Appx. 5] Dkt. 30-3 (11/26/12 Transcript), at 7:4-12:14 (emphasis added).

D. Judge Hughes Denies Shah's Request For Stay Pending Recusal Filing And Ruling

On December 14, 2012, TDCJ filed its Motion for Summary Judgment. *See* [Appx. 1] SDTX Dkt. 16. On January 11, 2013, Mr. Shah moved for a Rule 56(d) continuance, *id.* at Dkt. 20, and filed his "Incomplete" Response to TDCJ's Motion for Summary Judgment. *Id.*, at Dkt. 21.

On January 15, 2013, the District Court scheduled its third pre-trial conference for January 24, 2013, at 2:00 p.m. *Id.*, at Dkt. 23.

On January 24, 2013—before the third pre-trial hearing scheduled for that date commenced—Shah filed an Amended Notice of Intent To File Motion To Recuse And Request For Stay Until The Recusal Motion Can Be Addressed. *Id.*, at Dkt. 25; Dkt. 46. In his Amended Notice, Mr. Shah specifically requested that the District Court "stay any further action on this case until the Recusal Motion is filed and can be ruled on." *Id.*, at Dkt. 25, at 2; Dkt. 46.

The District Court denied Mr. Shah's request to stay the proceedings pending the latter's filing of a recusal motion and the District Court's ruling on the recusal motion. *Id.*, at Dkt. 26. In its Order, the District Court made clear its intent to proceed with the January 24, 2013 hearing. *Id.*

In fact, Judge Hughes proceeded with the 1/24/13 hearing. During the January 24, 2013 hearing, Mr. Shah again moved the District Court to stay any further proceedings pending his filing of his motion to recuse. *See* [Appx. 9] Dkt. 40, at 94:12-14.

In response, Judge Hughes stated: "Absolutely not." *Id.*, at 94:15. Judge Hughes then asserted that Ms. Miller—Mr. Shah's counsel—had "mischaracterized the conversation" that transpired between him (Judge Hughes) and TDCJ's counsel at the November 26, 2012 conference. *Id.*, at 94:16. Judge Hughes then made a purposeful attempt to whitewash some of the racist statements that he had made during the November 26, 2012 pre-trial conference. *Id.*, at 94:19-96-9.

E. Shah Moves To Recuse Judge Hughes

On January 31, 2013, Mr. Shah filed his Motion To Recuse Judge Hughes. *See* SDTX Dkts. 29, 30, and 41. In his Motion To Recuse (Dkt. 29) and Amended Motion To Recuse [Appx. 5] (Dkt. 30), Mr. Shah argued that Judge Hughes'

recusal was mandated by 28 U.S.C. section 144 and 28 U.S.C. section 455 because Judge Hughes had held an *ex parte* pre-trial conference on November 26, 2012, in which he demonstrated personal bias and prejudice against Mr. Shah and in favor of TDCJ, and/or because, in light of the 11/26/12 hearing, his impartiality might reasonably be questioned. *See* Dkt. 29 and [Appx. 5] Dkt. 30. In conformity with 28 U.S.C. section 144, Shah attached as exhibits to his Motion To Recuse a transcript of the November 26, 2013 pre-trial conference and affidavits from himself and Ms. Miller.

On February 5, 2013, TDJC filed its Response to Mr. Shah's Motion To Recuse. *See* [Appx. 10] Dkt. 38. On February 15, 2013, Mr. Shah filed his Reply to TDCJ's Response. *See* [Appx. 12] Dkt. 44.

**F. Judge Hughes Refuses To Rule On Motion To Recuse And
Continues To Preside Over The Case**

To date—almost seven (7) months after Mr. Shah filed his Motion to Recuse—Judge Hughes has failed to rule on that motion—in derogation of not only 28 U.S.C. section 144 (*see infra*) but also the “six month” rule prescribed by

28 U.S.C. section 476(a)(1).⁴ Moreover, Judge Hughes has made clear that he has no intention of ruling on Mr. Shah's Motion To Recuse in the foreseeable future.

That is, on June 3, 2013, Mr. Shah filed his Motion To Expedite Consideration Of Motion To Recuse. *See* Dkt. 49. To date, almost three (3) months later, Judge Hughes has yet to rule on the Motion To Expedite as well.

Yet, although Judge Hughes has refused to rule on Mr. Shah's Motion to Recuse and Motion To Expedite, Judge Hughes has continued to preside over and issue substantive rulings in the litigation. For example, on May 29, 2013, Judge Hughes issued an "Order on Discovery," in which he required Mr. Shah to produce certain information to TDCJ. *See* [Appx.1] Dkt. 48. Additionally, Judge Hughes has continued to "review" the litigation "internally." *See* Docket entries for 3/1/13, 5/29/13, and 8/14/13.

IV. ISSUES PRESENTED

1. Whether Judge Hughes Should Be Disqualified Under 28 U.S.C. section 144 and 28 U.S.C. section 455.

⁴28 U.S.C. section 476(a)(1) provides:

The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer - (1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending...

V. ARGUMENT:

The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") should order Judge Hughes to recuse himself from this case under 28 U.S.C. section 144 and/or 28 U.S.C. section 455.

A. 28 U.S.C. Section 144 And 28 U.S.C. Section 455

Judge Hughes should be recused under 28 U.S.C. section 144 and 28 U.S.C. section 455. 28 U.S.C. section 144 provides, in relevant part:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. section 144 relates to charges of "actual bias." *Henderson v.*

Dep't of Pub. Safety & Corr., 901 F.2d 1288, 1296 (5th Cir. 1990). To proceed under § 144, the movant must present an affidavit that meets the following requirements: "(1) the facts must be material and stated with particularity; (2) the facts must be such that if true they would convince a reasonable man that a bias exists; and (3) the facts must show the bias is personal, as opposed to judicial, in nature." *Id.*

28 U.S.C. section 455 provides, in relevant part:

- (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...

Under §455, a judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned." The standard is "whether a reasonable person, with full knowledge of all of the circumstances, would harbor doubts about the judge's impartiality." *Matassarini v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999); *In Re Chevron U.S.A., Inc.*, 121 F.3d 163, 166-167 (5th Cir. 1997).

A petition for writ of mandamus is an appropriate vehicle for challenging the denial of a motion to recuse. *In Re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) ("We note at the outset that a petition for writ of mandamus is an appropriate legal vehicle for challenging the denial of a disqualification motion, but it is relief granted only in exceptional circumstances."). Although this court reviews a District Court's denial of recusal for abuse of discretion, "[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal," as the statute "seeks to protect against even the appearance of impropriety in judicial proceedings." *Id.*, at 165 (quoting *Nichols v.*

Alley, 71 F.3d 347, 352 (10th Cir. 1995)); *Paterson v. Mobil Oil Corp.*, 335 F.3d 476, 484 (5th Cir. 2003).

B. Judge Hughes Has Effectively Denied Shah's Motion To Recuse

Although Judge Hughes has not formally ruled on Mr. Shah's Motion to Recuse, Judge Hughes has effectively denied that motion. That is, Mr. Shah filed his Motion To Recuse on January 31, 2013. Although almost seven (7) months have passed, Judge Hughes has not only failed to rule upon that motion but has denied Mr. Shah's Motion To Stay the case pending a ruling on the Motion To Recuse and has failed to rule upon Mr. Shah's Motion To Expedite consideration of the Motion to Recuse. In the meantime, Judge Hughes has continued to hold hearings and to issue rulings on discovery matters. At a minimum, such conduct violates 28 U.S.C. section 144's requirement that, once a "timely and sufficient" affidavit supporting a Motion To Recuse has been filed—as it was by Mr. Shah—the *"judge shall proceed no further therein..."* See 28 U.S.C. section 144 (emphasis added).

C. Judge Hughes' Statements And Actions Reflect Bias And Prejudice Against Shah Or, At A Minimum, Would Cause A Reasonable Person To Harbor Doubts About His Impartiality

Judge Hughes' statements in the November 26, 2012 conference reflect actual bias and/or prejudice against Mr. Shah or, at a minimum, would cause a

reasonable person to harbor doubts about his impartiality. First, Judge Hughes' gratuitous, uncritical reference to "Adolf Hitler" and the "swastika"—the architect and the symbol, respectively, of the Holocaust, the largest state-sponsored ethnic and religious mass murder in human history—are beyond the pale in a case of race and national origin discrimination and would lead any reasonable person to believe that Judge Hughes is insensitive to an alleged victim of racial and national origin discrimination, such as Mr. Shah.

Second, in context, Judge Hughes' statement that Indians are "Caucasian," and not a distinct racial minority, would cause a reasonable person to believe that Judge Hughes would not comply with the prevailing law that Indians are a protected class under Title VII and 42 U.S.C. §1981. *See, e.g. Arora v. Starwood Hotels & Resorts Worldwide, Inc.*, 294 Fed. Appx. 159 (5th Cir. 2008) (employee born in India in protected class under Title VII); *Thomas v. Trico Prods. Corp.*, 256 Fed. Appx. 658 (5th Cir. 2007) (employee of Indian ancestry and national origin in protected class under Title VII and 42 U.S.C. §1981).

Third, Judge Hughes' statement that "[t]hey" – referring to people of Indian descent – "act a lot like Germans" establishes that Judge Hughes harbors a bigoted, stereotyped view of Indians (as well as Germans). The fact that Judge

Hughes would give vent to such bigotry and stereotype in a Title VII race/national origin discrimination lawsuit is all the more offensive.

Fourth, in this same vein, Judge Hughes' gratuitous, critical remarks about college diversity programs—to wit, that these programs involve "painting students different colors so that they would think they were mixed"—would lead a reasonable person to believe that Judge Hughes would not comply with prevailing Supreme Court jurisprudence that racial/ethnic diversity and "affirmative action" programs—including those operated by the State of Texas and designed to benefit minorities, such as Mr. Shah—are, in certain circumstances, constitutionally permissible. *Ricci v. DeStefano*, 557 U.S. 557, 582-628 (2009).

Fifth, Judge Hughes' statements that “every” State of Texas employee demonstrates a “level of obnoxiousness” and *wrongly* believes himself/herself to be “underpaid” would cause a reasonable observer to harbor doubts that Judge Hughes could be impartial to a state employee, such as Mr. Shah, in a case that involves the fairness and equality of the latter’s compensation. The same is true of Judge Hughes’ statement—framed as a rhetorical question—that Mr. Shah could not have been “denied economic opportunity” because he was “the longest serving engineer” in his group.

Sixth, after making his biased and bigoted remarks, Judge Hughes expressly invited TDCJ to file a motion for summary judgment, despite the fact that discovery had barely commenced and Judge Hughes had yet to “allow” Mr. Shah to depose *any* of TDCJ’s witnesses.⁵ Such conduct would cause a reasonable observer to conclude that Judge Hughes had already pre-judged the case in favor of the government.

Finally and critically, Judge Hughes made these offensive statements in an *ex parte* hearing that he convened despite knowing that Mr. Shah’s counsel (Jo Miller) was sick and was unable to attend and despite failing to make any attempt to allow Mr. Shah’s counsel to participate by telephone. Such egregious conduct violates the Code of Conduct for United States Judges. Specifically, Canon 3(A)(4) of the Code of Conduct for United States Judges provides:

A judge should accord to every person who has a legal interest in a proceeding, and that person’s lawyer, the full right to be heard according to law. *Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers.* If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

⁵In Judge Hughes’ court, parties are only allowed to conduct oral depositions and, in fact, any other discovery with Judge Hughes’ permission.

- (a) initiate, permit, or consider ex parte communications as authorized by law;
- (b) when circumstances require it, permit ex parte communication for scheduling administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;
- (c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or
- (d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

See Code of Conduct for United States Judges, at Canon 3.

Judge Hughes' recusal is mandated by *In Re Chevron U.S.A., Inc.*, 121 F.3d 163 (5th Cir. 1997). In *Chevron*—a mass tort action with “overtones or implications of alleged race discrimination”—another United States District Judge in the Southern District of Texas made similarly egregious biased and bigoted remarks as those made by Judge Hughes.¹ The federal district judge declined to recuse himself.

¹ The trial judge's remarks are excerpted at footnote 12 of *Chevron*. *See Chevron*, 121 F.3d at 166 n. 12.

On a petition for writ of mandamus, the Fifth Circuit denied the writ but held that recusal was required under 28 U.S.C. 455(b). Specifically, this Court held:

Despite the assurances of counsel present when the statements were made that they were made either in jest or purposely were outrageous or sarcastic and used by the judge to emphasize his point in explaining his position, and that no harm was intended, we must consider more. Regardless of intent, it is totally unacceptable for a federal judge--irrespective of the judge's color—to make racially insensitive statements or even casual comments of same during the course of judicial proceedings. Such are not to be tolerated in any litigation and most decidedly are verboten in litigation in which racial or ethnic considerations are relevant to an issue before the court. When they occur, the risk of creating a public perception that the judge has a bias or prejudice which might affect the outcome crosses the proscribed threshold. This is especially true in a racially-charged case such as the instant one. Accordingly, here a reasonable person might indeed harbor doubts about the trial judge's impartiality and recusal would be appropriate under the terms of § 455(a).

Id., at 166-67.

In contrast to *Chevron*, the instant case does not involve merely “overtones or implications” of race discrimination but a claim of *actual* race and national origin discrimination under the federal employment discrimination statute, Title VII of the Civil Rights Act of 1964. Therefore, *Chevron* mandates Judge Hughes’ recusal.

D. Alternatively, The Fifth Circuit Should Order Judge Hughes To Rule Immediately On Shah's Motion To Recuse And Stay Proceedings Until Such A Ruling Has Issued

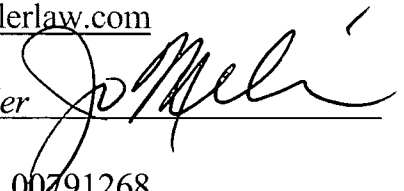
In the alternative, the Fifth Circuit should order Judge Hughes to rule immediately on Mr. Shah's Motion To Recuse and stay any further proceedings until such a ruling has issued. As previously noted, Judge Hughes has violated 28 U.S.C. section 144's requirement that, once a "timely and sufficient" affidavit supporting a Motion To Recuse has been filed, the District Court "*judge shall proceed no further therein...*" See 28 U.S.C. section 144 (emphasis added). Indisputably, this Court has the power to compel Judge Hughes to comply with section 144's statutory mandate. See, e.g., *Will v. Calvert Fire Ins. Co.*, 98 S. Ct. 2552, 437 U.S. 655 (1978) ("There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ "in order that [it] may exercise the jurisdiction of review given by law.")

V. CONCLUSION

United States District Judge Lynn N. Hughes has engaged in statements and conduct that demonstrate bias and prejudice against Plaintiff/Relator, Jitendra Shah, and in favor of Defendant, TDCJ, or, at a minimum, would cause a reasonable person to harbor doubts about his (Judge Hughes') impartiality in this

Title VII litigation. Therefore, the United States Court of Appeals for the Fifth Circuit should order Judge Hughes' recusal pursuant to 28 U.S.C. section 144 and/or 28 U.S.C. section 455. Alternatively, the Fifth Circuit should order Judge Hughes to rule immediately on Mr. Shah's Motion to Recuse and stay further proceedings until such a ruling has issued.

Respectfully submitted,
LAW OFFICE OF JO MILLER, P.L.L.C.
505 North Main
The Parsonage
Conroe, Texas 77301
Tel. (936)539-4400
Fax. (936)539-4409
jmiller@jomillerlaw.com

By: /s/ Jo Miller 
JO MILLER
Texas Bar No. 00791268
Southern District Bar No. 20385
Attorney-in-Charge for Plaintiff,
Jitendra Shah


Of Counsel:
Scott Newar
State Bar No. 14940900
Law Office of Scott Newar
700 Louisiana, Suite 2550
Houston, Texas 77002
Telephone: 713-226-7950
Fax: 713-226-7181
newar@newarlaw.com

CERTIFICATE OF SERVICE

I hereby certify that, on August 28, 2013, this Petition For Writ of Mandamus was served upon Respondent, Texas Department of Criminal Justice ("TDCJ), through its counsel of record and upon United States District Court Judge Lynn N. Hughes in accordance with Rule 25 of the Federal Rules of Appellate Procedure.

/s/ Jo Miller

Jo Miller

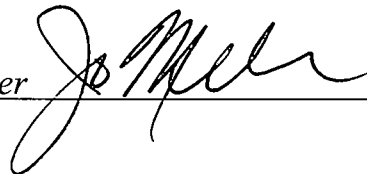


CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition For Writ Of Mandamus complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,471 words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Further, this Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because the Petition has been prepared in a proportionally spaced typeface using Word Perfect X6 in a 14-point font size (footnotes: 12-point font size) and Times New Roman style.

/s/ Jo Miller

Jo Miller



APPENDIX OF EXHIBITS

Exhibit 1.....	Southern District of Texas Docket Sheet
Exhibit 2.....	Plaintiff's Amended Motion to Recuse and Stay Proceedings (Dkt. 30) (Jan. 30, 2013)
Exhibit 3.....	Plaintiff's Amended Motion to Recuse and Stay Proceedings (Dkt. 30-1) Shah's Affidavit
Exhibit 4.....	Plaintiff's Amended Motion to Recuse and Stay Proceedings (Dkt. 30-2) Miller's Affidavit
Exhibit 5.....	Plaintiff's Amended Motion to Recuse and Stay Proceedings (Dkt. 30-3) 11/26/12 Transcript
Exhibit 6.....	Plaintiff's Amended Motion to Recuse and Stay Proceedings Supp. (Dkt. 31-1) Shah's Affidavit
Exhibit 7.....	Certification of Good Faith (Dkt. 41) (Feb. 14, 2013)
Exhibit 8.....	Miller's email to Court (Dkt. 45) (Nov. 26, 2012)
Exhibit 9.....	January 24, 2013 Hearing Transcript (Dkt. 40)
Exhibit 10.....	Defendant's Response to Plaintiff's Motion to Recuse and Stay Proceedings (Dkt. 38) (Feb. 5, 2013)
Exhibit 11.....	Plaintiff's Motion for Expedited Consideration of Motion to Recuse (Dkt. 49) (Jun. 3, 2013)
Exhibit 12.....	Plaintiff's Reply to TDCJ's Response (Dkt. 44) (Feb. 15, 2013)

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 29, 2013

Ms. Jo Miller
Law Office of Jo Miller, P.L.L.C.
505 N. Main Street
Carriage House
Conroe, TX 77301-0000

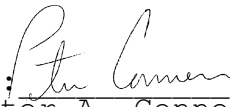
No. 13-20489 In re: Jitendra Shah
USDC No. 4:12-CV-2126

We have docketed the petition for writ of mandamus, and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See FED. R. APP. P. and 5TH CIR. R. 27 for guidance. Documents not authorized by these rules will not be acknowledged or acted upon.

Sincerely,

LYLE W. CAYCE, Clerk

By: 
Peter A. Conners, Deputy Clerk
504-310-7685

cc: Honorable Lynn N. Hughes
Mr. Allan Kennedy Cook
Mr. Johnathan Stone